UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS (LUFKIN DIVISION)

MARK ROBERTSON, et al, Plaintiffs, v. BRYAN COLLIER, et al, Defendants.	Case No. 9:23-cv-00023-MAC-ZJH Beaumont, Texas August 19, 2024 2:04 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ZACK HAWTHORN
UNITED STATES MAGISTRATE JUDGE

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(Call to order at 2:04 p.m.)

THE CLERK: All rise.

THE COURT: Thank you, please be seated. The Court calls case number 923-CV-23. It's titled Mark Robertson and others v. Bryan Collier and others. We're set this afternoon for a hearing on a motion to dismiss that was filed by the Defendants.

Who's here for the Plaintiff -- Plaintiffs?

MR. SPARKS: Your Honor, Mark Sparks and Elijah Smith from the Ferguson Firm and Catherine Bratic and Sam Dougherty from Hogan Lovells on behalf of Plaintiffs.

THE COURT: All right, thank you.

And who's here for the Defendants?

MR. CALB: It's Michael Calb and Matthew DeMarco from the -- we're Assistant Attorney Generals for the Defendants.

THE COURT: All right. Plaintiffs asked for a hearing. I normally don't have hearings on motions to dismiss because it's pretty much based on the pleadings. So what do you want to tell -- what do you all want to tell me?

MR. SPARKS: I think Ms. Bratic could probably or probably Mr. Dougherty just point out some of the things --

THE COURT: Sure.

MR. SPARKS: -- that we think are important.

THE COURT: Okay.

MR. SPARKS: I understand. We're grateful for the

Court giving us the hearing.

THE COURT: Okay, all right. Who's first?

MS. BRATIC: Yeah.

THE COURT: If you want to talk from the podium, please. Thank you.

MS. BRATIC: Yeah, go ahead. And I normally would not go first on the other side's motion to dismiss, but I think we wanted this hearing, Your Honor, to answer your question because we appreciate that there's over 100 pages of briefing on this motion to dismiss. There's a number of claims. And basically just wanted to make sure that we were available to the Court to address some of those kind of complex constitutional questions.

For my part, I'm going to just address the question of standing and the points that I think are important. And then, I'll pass over to my colleague, Mr. Dougherty, who will address the substance of the claims.

But the overall point here, so we were concerned that the Defendant's motion to dismiss was in addition to being based on some misstatements of the law, based on a number of pretty blatant mischaracterizations of the pleadings.

For example, the Defendants have contended that Plaintiffs do not say that their cells are dirty when the amended complaint describes cells that are covered in black mold and other people's blood with cockroach infestations.

So to describe that as Plaintiffs do not contend that their cells are dirty is a pretty blatant mischaracterization of the pleadings here.

The fact is that Polunsky death row contains some of the United States' most brutal death row conditions, which are described in detail in the complaint and also which describes the severe psychological and physical harms that have come to these Plaintiffs as a result of those conditions.

Those conditions are more than sufficient to state a claim under 5th Circuit precedent including Hope v. Harris and unfortunately far exceed the conditions that have been challenged in other conditions of confinement litigation around the country.

So for the Defendants to assert that this is mere displeasure and no one's alleging that their cells are dirty is frankly just an attempt to make their conduct immune from scrutiny.

On the question of standing, I want to highlight that the Plaintiffs have alleged concrete and particularized harms in connection with each cause of action, which is all that's required at the motion to dismiss stage.

In that analysis, the Defendants have suggested that the Court should conduct the standing analysis basically factual allegation by factual allegation.

See, you know, is Plaintiff A alleging that his cell

was moldy? Is Plaintiff B alleging that he had cockroaches in his food? That is not how the analysis should be conducted under 5th Circuit precedent. It's not done based on factual allegations.

The standing analysis is done on a claim basis. So the only question is under Rumsfeld, it only has to be one. Has any one of these Plaintiffs alleged that they have been injured due to the conditions of their confinement?

And in Hope v. Harris, the 5th Circuit said that conditions of confinement can and should be aggregated for the purposes of evaluating an Eighth Amendment claim.

And that's because that's how those Plaintiffs experience them. They don't experience just one part of it. They experience those conditions of confinement as a whole. And so for standing, the question is do those conditions as a whole injure them? Have they alleged that they injured them?

But even if we were to look, you know, on an allegation by allegation basis, I think that the complaint will still past muster because as you'll see in the Defendant's motion to dismiss, they admit that even for the specific factual allegations, at least one Plaintiff has alleged that there is standing to challenge exposure to mold to challenge the FPod, which is the super strength kind of punitive wing of death row where even worse things happen to challenge the lack of nutrition, challenge lack of recreation time.

So even under that standard, which we do not think is the correct one that the Court should apply, we think the complaint would pass muster.

I would also note for purposes of evaluating standing that for conditions that are obviously safe and likely to cause harm, the Plaintiff can simply plead that those conditions exist.

And I would refer to Helling v. McKinney, which was a 1993 Supreme Court case that actually dealt with secondhand smoke.

And in that case, the Supreme Court said you don't have to wait till you get lung cancer for us all to know that secondhand smoke is noxious to one's health.

And if your cellmate is smoking in the same cell as you, that's harmful and you don't have to plea to specific injury that you're coughing up a black lung here before you can sue.

By the same token, the Supreme Court said in that case, a plaintiff need not await a tragic event. They can complain about demonstrably unsafe drinking water, without waiting for an attack of dysentery.

So I think those are the conditions that we're dealing with here. We're dealing with blood on the walls, toxic black mold, roaches in food, inmates being denied recreation and proper nutrition when being held in a cell 23

hours a day, 24 hours a day on the many times when they don't get any rec or shower time. And those conditions are obviously harmful to one (sic) health, much more so than second hand cigarette smoke.

So even if we were not dealing with injuries here, which we are, that would be sufficient. These conditions are obviously harmful enough that the standing analysis presumes that those conditions would cause injury.

Before I turn over to my colleague, I just want to address standing and jurisdiction over the retaliation and access to counsel claims.

On the retaliation claim, the Plaintiffs have pled that less than a month after they filed this lawsuit, the Defendants changed their policies to severely restrict attorney visits. And those changes were accompanied by comments to Defendants and their counsel along the lines of be careful what you wish for.

There were also specific threats to Mr. Cummings and his attorney. Mr. Cummings was from prevented from meeting with an attorney. And 11 guards eavesdropped on a conversation between Mr. Ward and our law firm.

Those claims of retaliation allege injuries that are far greater than the injuries held to confer standing by the 5th Circuit in Hope v. Harris.

In that case, the injuries from retaliation were

simply being moved from one cell to another and having a typewriter confiscated. So we would submit that the injuries here are more than sufficient to clear the bar under that precedent.

And finally, as to the access to counsel claim, there's also a jurisdictional question here whether the Defendants have essentially alleged that, yes, they would argue that, yes, these individuals do have a right to access to counsel, which for Mr. Ward is a constitutional right. For Mr. Robertson, it's a state statutory right because he's in state habeas proceedings. And for Mr. Cummings, it's a federal statutory right because he's in federal habeas proceedings.

But they can't, basically is what the Defendants argue, they say it -- okay, you have a -- may have a constitutional right to have counsel, but if someone takes that away, you don't get to have a lawsuit.

Well, that's simply not correct. This is a lawsuit under 1983, which gives an individual a right to assert a claim for enforcing an underlying right either found in the Constitution or in a federal statute.

Whereas state has chosen to act in the realm of due process for via state statute. For example, the state access to counsel law that applies in Mr. Robertson's case, 1983 also gives an individual a right to assert a claim on that basis.

And finally, as to injury in fact for denial of

access to counsel, it is not required, contrary to what the Defendant suggests, that a plaintiff show that their litigation was prejudiced, that they would have won a case but for this interference and then they lost the case.

That, I mean, as we all know as people who litigate, it's often impossible to show that one specific fact caused you to win or lose a claim. And that's simply not what's required under the precedent of the 5th Circuit access to counsel claims.

The 5th Circuit has said that prejudice is presumed in situations where the government intentionally interferes with an attorney-client relationship.

So in Guild v. Securus Techs, the 5th Circuit found that allegations that the Plaintiffs were prejudiced by recording and sharing by the government of their confidential telephone calls was sufficient to support a presumption of prejudice at the pleading stage.

So, here, the plaintiffs have alleged that guards, the government who very adverse party, confiscated materials, were forced to meet with their counsel in environments that were monitored by guards and open to the public.

All of them have had legal materials inspected. That is specifically the type of harm that in Guild v. Securus Techs, the 5th Circuit said would support a presumption of prejudice for interference with the attorney-client

relationship.

So I'm going to hand over to -- for the substance of the claims to my colleague, Sam Dougherty, who will address the kind of 12(b)(6) motions and qualified immunity.

THE COURT: Who's going to talk about class certification?

MS. BRATIC: We are not here on class certification today. So I think the answer is nobody.

THE COURT: Okay. Well, that's kind of what I'm getting hung up on.

MS. BRATIC: Uh-huh.

THE COURT: And it's going to be very difficult to grant or deny a motion to dismiss when you're trying to certify a class because you've got to show individual issues don't predominate or common issues of law in fact over individual issues. And then, you're complicating with the injury in fact analysis.

It's really hard for me to, you know, without knowing who my Plaintiffs are, or who the Plaintiffs are to decide the motion to dismiss.

I -- in other words, if I grant it, deny it, grant it in part, deny it in part, on some of these let's say standing on this person, no Sixth Amendment violation on him, but a Sixth Amendment violation on him, and then I have to go to a class certification stage, well, then that's going to be

incongruent because we've got 180 more potential Plaintiffs out there to deal with.

So Mr. Sparks?

MR. SPARKS: I think subclasses are something that could help with that. I actually prepared a handout on each Plaintiff and identified the injuries alleged in the complaint, pinpoint cite to the complaint for the Court for my little portion of the argument.

But to answer the Court's question, in every class action, there's always individualized (indiscernible) issues. And I think the Court points out a great point.

Because if we're going to certify, we need to know who we're certifying, what we're certifying, and where we're certifying.

These are all people in Polunsky death row as I understand, it seemed to me that there would be some overarching consistent practices and procedures that would certainly for injunctive relief be right for certification.

THE COURT: But you've handled a ton of them.

MR. SPARKS: Yes.

THE COURT: Class certification's always the first one to go to merits, right?

MR. SPARKS: Yes.

THE COURT: So why is this -- it seems to me like we're jumping into merits giving lip service to class

certification and just kind of keeping it in the background.

MR. SPARKS: It seems that way to me, too, Your Honor --

THE COURT: Oh.

MR. SPARKS: -- but we had to defend the motion to dismiss obviously.

I think what I've been doing like we started to do in TPC, we just abandoned the class actions in those cases, but what we initially do is we set up a docket control order. As you know, it bifurcates.

But what always, always happens is there's some leakage of the merits into the class certification context because you can't do class certification discovery without some wink or nod to the merits. So, yes, most of our PCOs in the class actions that I handle do have a bifurcated type of approach to it.

THE COURT: Well, what do you want me to do here? Like let's say I get something out, you know, whenever, two months, I don't know.

MR. SPARKS: Right.

THE COURT: And then, assuming there's no interlocutory appeals, whatever, then do I need to start paying attention to class cert -- you are going to move to certify the class or we just going to keep it in the background or focus on summary judgment?

MR. SPARKS: I think you make us to do the work and make us make the decision.

THE COURT: Okay, well.

MR. SPARKS: What you do with respect, well --

THE COURT: Yeah.

MR. SPARKS: -- what I tell us to do is you all need to go work out a document control order when you deal with class certification first with some merits discovery, but not open merits discovery.

And then, Plaintiffs need to file a motion for class certification after they have sufficient data to do so. And at that point, I think we handle class certifications, Your Honor.

THE COURT: All right.

MR. SPARKS: In all the -- like in TPC, they were adamant TPC was originally, but they were adamant that they wanted a class certification done first. So that's what we typically hear from defendants when we get -- when we have a class action allegations.

THE COURT: All right. Mr. Dougherty?

MS. BRATIC: If I can --

THE COURT: Yes, ma'am?

MS. BRATIC: -- just make, sorry, one quick point on the standing issue first. I just want to be clear that under the precedent of the Supreme Court in Rumsfeld, the task is standing should not result in a winnowing of the plaintiffs

essentially that this plaintiff has standing, that plaintiff doesn't because under Article 3, all that's necessary is that one plaintiff has standing for this Court to have jurisdiction over the lawsuit and be able to proceed. So I just wanted to clarify that point.

It may be the case that when my colleague is speaking that that is where we have to discuss whether there should be a winnowing of claims by individuals, but for standing, once one Plaintiff has standing is all that's required.

THE COURT: Okay. Mr. Dougherty?

MR. DOUGHERTY: Thank you again, Your Honor. Appreciate your time today.

I just want to make a few points for you. The first is as to the Eighth Amendment claim, as you know, the standard there is the same as for standing and that is an aggregate unlike what the Defendants say when they attempt to parse out each individual allegation individually and say that they are not enough on their own.

That's not the standard under Hope v. Harris, where again, it is everything added together. Be that as it may, even if you were to take them individually, many of these claims would be sufficient.

For example, the black mold that we see throughout the unit and covering the cell of the wall in particular was sufficient in Hope. We also have next to no recreation.

That's also been sufficient in a number of cases, including Maze and Dillard.

And then, we also have severe lack of access to medical care. We have a named Plaintiff Mr. Ward, who broke his foot and it took the Defendants a month, 30 days, to get him a medically prescribed boot. They then took away the boot for no other reason. And it took them another 30 days to give it back to him.

Now, years later, Mr. Ward's broken foot is still swollen and still painful, again, as a result of the lack of access to medical care.

The -- so that's -- as you know, Your Honor, that's the first prong and the Eighth Amendment violation, right, as to the actual conditions.

And the second prong is deliberate indifference. And here, it is true that there is a subjective standard in that you have to allege that each Defendant knew about the conditions and did nothing to stop them.

But as we see in Farmer, the Supreme Court case, the subjective standard can use circumstantial evidence. And it's also a question of fact, such that if there's something that's sufficiently obvious, like for example cockroaches throughout the unit or black mold throughout the unit, or policies mandating 23 hours of individual time in a cell, that would be sufficient we posit for the Defendants to know about what harm

is being perpetrated against the Plaintiffs.

Moving on to the Fourteenth Amendment claim, we have lack of due process, here, unlike what Defendants argue, we do not need to allege a specific statute that provides a liberty interest in challenging the Plaintiff's conditions.

Instead, we can infer -- I'm sorry, instead, we can look at the nature of the conditions which we just reviewed. That alone is enough to create a liberty interest according to the Supreme Court in Wilkinson and the 5th Circuit in Wilkerson.

Again, moving on to the -- our Sixth Amendment access to counsel claim that is in dispute that Mr. Ward, who is a direct appeal should have access to his counsel.

He has not been able to, according to the Defendant's policies. They have interrupted and cancelled meetings with Mr. Ward's lawyers. And which is, you know, in effect, a violation of his right to effective counsel under Strickland.

We also have a Fourteenth Amendment access to counsel claim for all the Plaintiffs, including Mr. Robertson, who has a state habeas petition and Mr. Cummings, who has a federal.

For Mr. Robertson in particular, the state of Texas under Article 11.071(a) has provided guarantees for access to counsel under state habeas -- under state habeas proceedings. And by -- through their policies, they have denied Mr. Robertson the ability to enjoy that right.

Now by providing that right, we know again under Supreme Court precedent in McFarland that -- I'm sorry under Smith that the Defendants must protect that right. They have not done so.

And then, for Mr. Cummings under the federal habeas, we have statutory support for his right to counsel under §3599 of the U.S. Code.

And then, finally, I want to quickly address qualified immunity, which is a defense that the Defendants are alleging.

And under qualified immunity, you have to show a violation of a constitutional right, as well as conduct that is unreasonable in light of clearly established law.

And here, for the reasons I just articulated as in our complaint -- in our opposition, we have alleged violations of a number of constitutional rights.

And as for the clearly established right, the second prong, there have been a number -- there have been 5th Circuit cases including Valigura, excuse me for that pronunciation there, where the Court found there that there -- plaintiffs have an interest in being free from cruel and unusually punishment, Eighth Amendment, and that that is clearly established law, which we would posit also applies here.

Happy to answer any questions.

THE COURT: I'm good, thank you, Mr. Dougherty.

Mr. DeMarco, Mr. Calb?

Oh, yes, sir?

MR. SPARKS: I still have my little bit. I'm going to --

THE COURT: Okay.

MR. SPARKS: I just know I'll skip mine, but I have my little chart, I gave it to opposing counsel. Can I --

THE COURT: Yes, sir.

MR. SPARKS: -- give her a copy?

THE COURT: He's -- Ms. Piper. Okay.

MR. SPARKS: And it just discusses - it shows the location in the complaint where each individualized Plaintiff so you can see what they're alleging their damages are.

And we also have -- and I'm not going to -- I'm supposed to Ultra Vires, but I think the Court can see in the law required on that one. This is in reference to damages and to show that it's more than de minimis damages.

Your Honor, we have courtesy copies of all of this including the Defendant's materials that we'd like to offer the Court. We have binders if the Court is interested. If not, will take them away with us. Would the Court be interested in our --

THE COURT: Courtesy copies of what?

MR. SPARKS: The briefing.

THE COURT: Oh, I've got it right here.

MR. SPARKS: You've got everything?

THE COURT: Yes, sir, in this binder, yeah.

MR. SPARKS: Great, Your Honor, that's it.

THE COURT: Okay.

MR. SPARKS: We don't have anything else. We appreciate your all's time.

THE COURT: All right. Yes, sir.

MR. DEMARCO: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. DEMARCO: I would like to begin just, Your Honor, on the issue of standing, I do think that a class action, we need to be able to identify what claims as of which are being brought by whom.

To have standing, a Plaintiff must satisfy three elements. Injury in fact, which is concrete and particularized actual and imminent, causal connection between the injury and the conduct complained of, and the likelihood that a favorable decision will redress the injury.

That a suit may be a class action adds nothing to the question of standing. In a putative class action, the named plaintiffs who represent a class must allege and show that they personally have been injured, not that the injury has been suffered by other unidentifiable members of the class to which they belong in which they purport to represent. And that's Lewis v. Casey, Supreme Court.

As for the access to counsel, an inmate who has standing to the challenge has access to the courts if he has suffered an actual injury stemming from the purported restriction. He must plead actual prejudice with respect to contemplated or existing litigation such as an inability to meet a filing deadline or to present a claim as of which Plaintiffs have pled none.

Plaintiffs allege that inmates at Polunsky death row face various restrictions to accessing their counsel in -- regarding visits and phone calls with attorneys, receiving legal mail, violations of the attorney-client privilege, intimidation tactics.

However, Plaintiffs do not assert that these alleged restrictions resulted in any actual prejudice, which caused harm to any contemplated or existing litigation. As such, they lack standing.

With regards to the retaliation claims, Plaintiffs also must be dismissed for lack of standing because even if viewed separate and apart from their access to counsel claims, they still fail.

The shower-related claims I know the Plaintiffs claim to have been injured by insufficient water access or shower access, they lose on those grounds.

Plaintiffs allege generally that inmates on Polunsky death row are sometimes deprived of mattresses, none of which

claim to be currently deprived of a mattress, again must fail.

Insect-related claims fail to allege any concrete injuries. There's also case law that insects are a fact of life in East Texas.

THE COURT: Can we just agree, probably not, that there's some injury if there's insects in your food that you're about to eat? I mean, really?

MR. DEMARCO: Your Honor, I have eaten bugs before.

THE COURT: Well, I understand that, but that's -- I mean, the allegations I have to believe to be true is he had roaches crawling around in his food. And say that they also need to show or allege some kind of prejudice to that. I mean, come on.

MR. DEMARCO: Your Honor, the allegation is that it occurred one time.

THE COURT: Uh-huh. Uh-huh. Other than that, the food loaf is pretty good, other than the insects?

MR. DEMARCO: Your Honor, I can't comment on the food.

THE COURT: Okay, have you ever had food loaf?

MR. DEMARCO: I have not had the pleasure yet.

THE COURT: All right.

MR. DEMARCO: I have eaten at officer dining hall, but not the food loaf.

THE COURT: Okay. The officers eating food loaf?

MR. DEMARCO: I'm unaware, Your Honor.

THE COURT: Okay.

MR. DEMARCO: In regards to the mold-related claims, Plaintiffs allege that cells on Polunsky death row are often infested with black mold.

However, with the exception of Robertson and Curry, the remaining Plaintiffs fail to allege any concrete injuries regarding damages from the mold.

As far as FPod, the only Plaintiff who claimed to have actually spent time on FPod was Ward. And that was from November of 2022 to February of 2023. And Ford, for an unspecified period in 2012. Robertson for an unspecified period.

And of those three, only Ward specifies any injuries from his time on FPod. And Plaintiffs cannot establish standing just on the mere fact that they may be placed in FPod in the future.

Related to the food, Ford and Ward do claim to have lost weight from insufficient food. However, Robertson, Curry, and Cummings do not claim to have any -- suffered any nutritional defects.

And then, as far as the recreational restrictions, while they do specify injuries resulting from insufficient recreation, Cummings and Ward do not. As such, those claims should be dismissed.

In regards to the Eighth Amendment claims, Your Honor, to state an Eighth Amendment claim, 1983, a plaintiff must allege a right secured by the Constitution and violation of that right by one or more state actors.

It's been well settled that the Constitution does not mandate comfortable prisons and that prison conditions may be restrictive and even harsh without running afoul of the Eighth Amendment.

A prisoner must satisfy a two-part test consisting of objective subjective components to state an Eighth Amendment conditions of confinement claim.

First, objectively, the prisoner must allege the existence of conditions so serious as to deprive prisoners of the minimal measures of alleged necessity as well as to deny the prisoners some basic human right.

While a prisoner need not await a tragic event before seeking relief, he must at the very least show that condition of confinement poses an unreasonable risk of serious damage to his future health.

Second, under the subjective component, a prisoner must establish that the responsible prison officials acted with deliberate indifference to his conditions of confinement.

To satisfy that component, must allege indicating that the prison official was aware of facts from which the inference could be drawn that a substantial risk of serious

harm exists and that they subjectively drew the inference that the risk existed and disregarded that risk.

The alleged conditions are not sufficiently extreme. Only where solitary confinement conditions are based on inhuman or barbaric conditions do they satisfy the Eighth Amendment objective component.

A common thread which is actual in claims is the deprivation of basic elements of hygiene, but Plaintiffs allege no extreme deprivations of basic hygiene.

Rather, they allege conditions of confinement which rest entirely on the indefinite nature of their solitary confinement housing, coupled with alleged exposure of mold and insects and restrictions to showers, food, and mattresses.

And at the risk of repeating myself, Your Honor, I will now pass it over to my colleague, Mr. Calb.

THE COURT: Okay. Thank you, sir.

MR. CALB: Thank you, Your Honor.

THE COURT: You're welcome.

MR. CALB: Just to go back to why it's important to look at all of these conditions individually, you know, we look at the standing question, yes, one individual Plaintiff could have standing. And that could be enough for the other Plaintiffs if he has a claim based on a series of or a confluence of conditions that in and of itself would state an Eighth Amendment claim.

But the point here is that no individual Plaintiff has sufficiently alleged a confluence of conditions which in of itself would violate the Eighth Amendment's objective component. So just to make that clear.

We're not saying that no Plaintiff has suffered any injury. We're saying that no Plaintiff has suffered sufficient injury such to make up the objective component of an Eighth Amendment claim. And that's sort of laid out in our brief in detail.

And it's hard to do an oral argument because there's different, you know, facets of each -- the complaint's over 50 pages long. And there's lots of allegations that are barred by the statute of limitations. There were others that are former conditions that they're no longer allegedly present. So there's a lot of nuance that I think needs to be addressed. And that's done in the briefing.

But I'll move on just for the sake of time to the remaining claims. Plaintiffs bring a Texas constitution claim. Basically, it's the Texas state constitution version of the Eighth Amendment. It's Article 1, Section 13.

And there's case law that you -- the state is immune from those types of claims. You can't bring a state constitutional claim in federal court. It's Pennhurst v. Halderman (sic).

In McKinney v. Abbott, the 5th Circuit specifically

held that you can't bring a Texas constitutional claim for injunctive relief regardless of the type of relief sought in federal court.

There's an exception for *Ultra Vires* Act and that's what they're trying to fall under here. And the *Ultra Vires* exception is pretty narrow and it does not apply.

Here, you know, they specifically allege in their complaint the Defendants have the authority to compel or constrain conditions of confinement.

And yet, they're simultaneously arguing that they're acting *Ultra Vires*, which means that they're acting outside the scope of their authority in dictating the conditions of confinement.

It's not the case where that applies, Your Honor. So we would argue that the Texas constitutional claim should be dismissed on sovereign immunity grounds.

The Fourteenth Amendment procedural due process claim, you know, one case that I'll admit I didn't find when I was drafting the motion to dismiss, but on reply, I noted for the Court, it's a footnote in a 1981, 5th Circuit case, but it makes it very clear, it's Parker v. Cook, where back when the 5th Circuit encompassed Florida, they were looking at Florida death row and the conditions imposed there.

And it was -- the court was deciding whether or not there was a liberty interest such that it would give rise to

due process protections.

And they said in a footnote that, you know, because death row inmates are never placed in the general population or given any expectation of being placed in the general population, it appears that no liberty interest is affected when you're placed in administrative segregation. That's exactly the same situation here.

As Plaintiffs allege very clearly in their complaint, there's a blanket policy of placing every single male death row inmate in solitary confinement in the conditions on Polunsky death row automatically based on their death sentence. There's no discretion. That's actually what they're challenging. They want individualized assessments.

But because of that automatic nature of the transfer from their conviction into Polunsky death row with all the attendant circumstances and conditions, there's no expectation of any other conditions, and therefore, no liberty interest giving rise to due process protections.

Now that's what the Court held in 1981. We understand that since then, there's been jurisprudence that has sort of clarified what the test is.

And you know, under the new test in Sandin v. Conner, I guess not that new, it's 1995, the Court asks whether the conditions pose an atypical and significant hardship on the inmate in relation to the ordinary incidence of prison life.

Now, again, what is the appropriate baseline for atypically? What's atypical? You know, the cases that are cited by Plaintiff, we have Wilkerson and Wilkinson. One's 5th Circuit, one's Supreme Court.

In both of those cases, there was a decision by a prison authority as to what level of custody the inmates would be placed in. You know, they have discretion to place them in certain custody level. That's not the case here.

This is a unique circumstance like the 5th Circuit addressed in Parker v. Cook and like the 4th Circuit addressed in Prieto, which is a more recent decision, post Sandin, which applies the same test and says basically, you know, in where it is, in Sandin, was -- I'm sorry, Sandin was a test that established the atypicality.

And then, Prieto v. Clark in 2014, the 4th Circuit, held that when you're looking at the atypical and significant hardship, you have to look at where the inmate's expected to be, which is essentially exactly what the 5th Circuit decided in 1981 in the Parker decision.

THE COURT: Well, okay. So you have the Ellis unit in 99, which is they moved them from there. One of the Plaintiffs used to be on the Ellis unit. So I mean --

MR. CALB: Your Honor, I have a footnote addressing that.

THE COURT: Okay.

MR. CALB: It's specifically that basically to the extent they're challenging a decision that happened in 1999 beyond the statute of limitations.

THE COURT: Well --

MR. CALB: They're citing -- sorry, not to cut you off.

THE COURT: I think what -- I mean, the argument is our hands are tied. This is death row. Everybody gets it. It's a blanket policy, but it's not. I mean, it's -- they used have them in a different security protocol up until 1999.

And then they just built the Polunsky unit, built death row. And then, everybody got put in there.

MR. CALB: Your Honor, these are blanket policy now that's specifically --

THE COURT: Right.

MR. CALB: -- what's alleged in their complaint. So what matters for determining whether there's a liberty interest is what they can expect when got their criminal sentence -- when they got their death sentences.

And certainly, to the extent they want an injunction, you know, which they do, that you have to look at what happened -- what the conditions -- what the sorry what the liberty interest would be now in giving them a different, you know, potential conditions.

And there isn't any because the only condition they

can expect to have are to continue to be on Polunsky death row with all the attendant conditions.

And I think, you know, while the Prieto obviously decision's outside the circuit, it really did address the exact same circumstances here.

And then, we have the 5th Circuit ruling in Does v. Abbott in 2015 that in a very I would argue analogous circumstance where you have the -- you have sorry sex offenders who are not given any additional process when they have to endure restrictions based on their sex offense because they received process at their trial, their criminal trial.

And then, because it flowed automatically -- sorry, because the sex offender restrictions flow automatically from that sentence, there's no additional process required. We would argue the same thing is true here.

And more importantly, especially for qualified immunity purposes, we have this Clark -- so we have this Parker v. Cook decision, which is settled law in this jurisdiction that in this exact type of circumstance, there's no liberty interest giving rise to due process protections.

And -- but assuming there is a liberty interest, we also argue that the process they receive is sufficient. During the death sentencing portion of their criminal trials, all the Plaintiffs received a full hearing evidentiary in which they could present evidence and there was the ability to determine

whether or not they pose as future danger to society. That's one of the questions required for a death sentence. And --

THE COURT: Okay. What about women?

MR. CALB: Women are part of the class or --

THE COURT: I understand that --

MR. CALB: Yeah.

THE COURT: -- but women aren't -- they are not on Polunsky death row or at least they have -- they don't have the restrictions that the men do? And then, the women on death row the jury made the same finding, correct?

MR. CALB: Correct.

THE COURT: Okay.

MR. CALB: The question --

THE COURT: How do you explain that?

MR. CALB: My -- I guess the difference is -- I'm talking purely in terms of whether or not it's sufficient for due process.

THE COURT: Well, you said a jury made a decision that they constitute beyond a reasonable doubt a continuing threats of violence or whatever to society.

MR. CALB: Uh-huh.

THE COURT: Danger to society. And you said, well, a jury's already found they did. Well, they found women did too that are sentenced to death, but they're not on death -- Polunsky death row either.

MR. CALB: Right, I understand the discrepancy. I can't tell you the reasoning behind that. What I can tell you --

THE COURT: What about the people in which they answered yes to the mitigation special issue? They're not on death row.

MR. CALB: The point of this argument, Your Honor, is pretty narrow. I'm not trying to --

THE COURT: I think the point of the argument you're trying to make is a jury has already made a determination that they constitute a continuing threat to society. And that's the process that they got.

It doesn't sound like a very good process if the jury made the same determination on a female, but yet, she doesn't get the same treatment.

MR. CALB: So --

THE COURT: Or to someone in which the jury found favorably on the mitigation special issue, they don't get the same special treatment either.

MR. CALB: We're talking purely about procedural due process, which is noticing an opportunity to be heard. Whether there's discrepancies in the outcome, whether there's, you know, different nuances of how that works, you can question whether it's sufficient right for various purposes, but --

THE COURT: Well, that's what I'm questioning whether

that's sufficient.

MR. CALB: Right, purely as -- there's no question, let me baseline it. There's no question that at the criminal trials, they had notice and opportunity to be heard.

THE COURT: About where they should be designated in TDCJ?

MR. CALB: About whether or not they contested whether or not they were -- they met the standards to be -- to receive a death penalty.

THE COURT: I understand that. But it doesn't -- the special issues that they decide in the penalty phase have nothing to do with security level designation.

MR. CALB: I think there's -- I would quarrel with that only because there is case law that, you know, when jury's supposed to look when they're determining future dangerousness, they are supposed to think about the danger they pose in prison. There's case law, both state and federal court, saying that that's part of the analysis. Absolutely.

THE COURT: I understand that, but some juries have said, yes, they do, but they found favorable forum and the mitigation special issue.

MR. CALB: That's true. Again, Your Honor, I'm really only saying something very basic here is that because they received due process in their trial at all and because the death sentence is the reason why they're in the conditions of

confinement that they're in, automatically the fact that they receive procedurally sufficient due process at their criminal trials at all regardless of nature was met the standards of notice and opportunity to be heard. That's all I'm saying. That's the primary argument I'm making here.

Because of that, they don't need additional process. Once they get to prison and it's, you know, it's going to be basically a renewed determination of something. But again, we don't need to get there because there was no liberty interest is my argument primarily.

THE COURT: Okay.

MR. CALB: Okay. You know, there's lots of this case law as cited in the briefing.

All right, and for the Sixth Amendment access to counsel claim, there's a few problems. You know, they didn't bring their First Amendment claim, First Amendment access to counsel claim, although that would also fail. I'm explain in a second.

They brought it as a Sixth Amendment claim. Sixth Amendment only applies to, you know, your criminal case and your first right of appeal. The only Plaintiff who is still at that stage or at least who was at the time of the briefing is I believe Ward.

THE COURT: So are you saying they don't have a right to counsel on their state habeas claims?

MR. CALB: So whether they have a right to counsel is different.

THE COURT: Right.

MR. CALB: So there's -- well, they have a right to it under their state statutes that say they -- they don't actually -- there's -- let me see is there -- yeah, there's a statutory provision which provide -- which says they have entitlement to counsel. It's Section 13, I'm sorry 3599, but courts have construed that as a funding statute not to rise to liability. There's no --

THE COURT: How about we do this? Let's just say according to your rule, if it's not a trial or direct appeal, then if somebody hired somebody to represent him on their state habeas claims that TDCJ can prevent that lawyer and client from ever talking?

MR. CALB: No, that's not what I'm saying, Your Honor. There's a First Amendment access to courts claim. That would be the proper mechanism for bringing that claim. They didn't bring that claim. They specifically said Sixth Amendment claim, which does not apply to any of the claims except for Ward.

But assuming it's a First Amendment claim access to courts, that's how it would be properly brought, the big problem is as was mentioned in the standing context, they don't have any sufficient injuries. They haven't alleged actual

prejudice to litigation.

You know, Curry doesn't allege any interference. Robertson says he was denied privacy during one meeting, but doesn't allege any prejudice resulting from that lack of privacy.

Ford says the guards intercepted documents once and took documents another time. It doesn't say any resulting prejudice. Cummings says he was unable to meet with his habeas counsel one time, but does not assert any resulting prejudice.

And Ward says guards searched through his documents before a meeting and intimidated him being they were in the presence of his attorney-client communication one time. And again, it doesn't assert that that resulted in any prejudice.

They mentioned this motion to dismiss and there, you know, might have resulted in their -- it might have impacted their ability to respond to this motion to dismiss, but I will posit Your Honor, that the motion to dismiss is entirely on the pleadings and it's unclear what they need to talk to their client about to discuss whether they client -- whether the pleading was sufficient to state a claim.

But even there, they didn't really allege specifically how that prejudiced them in this ruling since there hasn't been one.

You know, I'll notice the case that they cited is Guild v. -- I forget the exact, the Guild case cited by

Plaintiffs.

That -- in that case, the government recorded and shared the evidence for the other side. That was the case where the prison guards or whoever was involved actually recorded the conversation and provided it in a way that prejudiced their cases. They provided it to the government in some fashion.

It was not just a, you know, incidental situation where people were overhearing conversations or they're, you know, monitoring the hallway while these conversations are taking place, which is what is being alleged here.

You know, in terms of -- and I'll get to -- let me just turn to that now since we're already sort of touching on it.

The First Amendment retaliation claims, you know, you need three elements. You need a specific constitutional right. You need the intent to retaliate. You need a retaliatory adverse act, right? There is no retaliatory adverse act here that's being alleged.

Mere threats, which are alleged. They're alleged threats are not under clearly established law are not sufficient to constitute an adverse act to make a First Amendment retaliation claim.

Threatening language and verbal harassment, said the (indiscernible) court is not sufficient. In Bell v. Woods, the

5th Circuit said plaintiff has not stated a retaliation claim because he's alleged only threat, not a retaliatory adverse act.

And Plaintiffs cite to cases to refute that claim. They recite to Brown v. Taylor and Jackson v. Cain. But in both of those cases, the Court held that the threats were evidence of causation, not that the threats themselves constituted the adverse acts.

There were other adverse acts in those cases that were sufficient to meet that element of the First Amendment retaliation claim. So I'll make sure that, you know, distinguish those claims.

So, and then last, I'll touch on qualified immunity. Our view is that, you know, all of these claims to the extent they're being brought against Defendants in their individual capacities are barred by qualified immunity. With the rest of the claims that I mentioned, you know, we have the Fourteenth Amendment claim.

You know, the 5th Circuit decision in Parker in our view, precludes any finding of individual liability for the lack of due process, as does -- and for the Sixth Amendment claim, you know, it's -- it's the -- there's lots of case law that you require an actual prejudice that our clients reasonably relied on that when they, you know, when they had the restrictions on attorney-client phone calls, et cetera.

In fact, a lot of those restrictions that they're claiming, I forgot to mention this, Your Honor, I'll end with this, is that there, you know, restrictions that they're claiming had been upheld by the court in many instances. There's no absolute right to unfettered access to your attorney in prison.

There is a right to access to your attorney. And we acknowledge that fully, but the restrictions that they're complaining about, for example, no contact visits have been -- has been upheld by the Supreme Court as being okay. No unshackled contact visits absolutely been upheld as being okay.

The other restrictions, you know, sometimes difficulty in getting access to a phone call by the timing and these restrictions on, you know, how long it takes to get it set up, there's no hard and fast rule on that, Your Honor. And for qualified immunity, that should save us.

But even in terms of the claim for injunctive relief as to which qualified immunity wouldn't attach, we posit that none of those restrictions are sufficient enough to violate the First Amendment or the Sixth Amendment regardless of which analysis you undertake because there's been no actual prejudice alleged.

So with that, I'll close, Your Honor.

THE COURT: All right, thank you.

MR. CALB: Any questions?

THE COURT: No, sir.

MR. DOUGHERTY: Your Honor, do you mind if I address a couple points?

THE COURT: Yes, sir.

MR. DOUGHERTY: Thank you, I'll be very quick. So I wanted to clean up some of the things that Defendants again tried to misrepresent.

So, first, about the insects, there are multiple allegations about insects from Mr. Curry and Mr. Cummings. And additionally, we also alleged that the insect problem has gotten worse every year.

As for the claim that there's no harm from mold and lack of hygiene, you know, I would point the Court to paragraph 43 of the complaint, where we allege that Mr. Robertson wakes up at night having trouble breathing because of the mold.

And I'll also, you know, again, as to the lack of hygiene, just mention that Mr. Cummings was forced into a cell, covered in blood, chained to a bed, and then was forced to clean it himself. That speaks for itself.

And then, finally, as to retaliation claims that we have, there is case law that talks about how if you have a chronology of events, that will -- that is helpful when making that claim.

Here, we have the original complaint was made and less than a month later, Polunsky changed its policies and

created a new confusing and seemingly arbitrary policy where they would cancel visits with attorneys. They would stand behind the defendant -- the Plaintiffs during their meetings with the attorneys, and they would refuse to allow the attorneys to provide their clients with legal documentation.

THE COURT: You don't have to answer this --

MR. DOUGHERTY: That's all I have.

THE COURT: -- but if you talk to the attorneys, do they just tell them, guys, you all need to leave? I had that happen to me one time. Some guard just sat there. I said get out of here and he left. I mean, did they ever just tell them leave, I'm talking to my client?

MR. DOUGHERTY: I believe in the complaint we have that they -- the attorneys at least on one occasion was also intimidated. I don't that in front of me, but I don't know the answer to that question.

THE COURT: Right, okay.

MR. DOUGHERTY: Yeah.

MS. BRATIC: I can -- I mean, visit on the record but I think, you know, we did and this is described in the complaint have a sort of surreal experience speaking to one of our clients while the -- while we were briefing these arguments where 11 different guards walked by.

And our phone call took hours because each time, our client would go away, the guard walking by staring at me was

standing here. I told him to go away. Okay, he went away. Now here's another one. There were 11 guards who walked by at that time. So to answer that question.

And as well, I'm standing, I'll address the point about standing, which was, Judge, to your kind of hypothetical question of whether that would confer standing if you have a plaintiff whose in the middle of state habeas proceedings, so he has a state statutory right to access counsel and the government says, well, your counsel can never meet with you. Guild v. Securus Techs was a 5th Circuit case that they asked directly for the principle. You do not have to wait to lose your lawsuit. You do not have to wait to lose your state habeas claim before you have standing to complain about lack of access to counsel.

When the government is very obviously like that, intentionally trying to interfere with the attorney-client relationship, prejudice is presumed. You don't have to wait to show injury.

And there's a distinction in the case law there between prejudice where access to counsel claims and injury, which is normally what's required for other types of claims.

And that difference in the language is precisely because we presume prejudice when the government intentionally does things like that that we know will have harmful effects.

THE COURT: Well, what I was asking him about was,

you know, they basically said you can't have a Sixth Amendment -- well, I interpreted their argument, that you can't have a Sixth Amendment claim unless it's a trial or direct appeal, because you don't have a constitutional right to counsel.

And so, my state -- my hypothetical is for state habeas proceedings. Somebody hires a lawyer, can they just prevent all access?

And he told me that that's not a Sixth Amendment violation, that's a First Amendment violation to access to courts.

So I really wasn't asking it about standing per se. I was just questioning about how is there not a Sixth Amendment violation -- can there only be Sixth Amendment violations when counsel is required?

MS. BRATIC: Right, the --

THE COURT: Under the Sixth Amendment I guess.

MS. BRATIC: Right, so we would say no, but again, on the -- if it's a standing question, we do have one plaintiff who is in direct appeals, but 1983 allows them to make a claim that their access to counsel of even statutory has been violated.

And that also applies even though 1983 we normally would think as protective federal statutory rights, it also protects state statutory rights when the state has taken the

initiative to act in an area that is covered by due process.

And the citation on that is U.S. ex. rel. Smith v. Baldi. It's a 1953 Supreme Court case. So I, you know, a bit old, but certainly still applies to the principle as really law that when the state chooses to act in this arena, they have to respect due process in doing so and can't arbitrarily just you can't speak to your lawyers.

THE COURT: Okay. Anything else from anybody? Yes?

MR. DEMARCO: No, Your Honor.

THE COURT: Oh, okay. Okay, it's going to be a while before I get something out. I'm doing my best, but there's a lot to go through here. And you know, I've got to dot all my I's and cross all my T's, obviously.

So I'm sorry it's taken this long to have the hearing, but continue to be patient with me, please.

MR. SPARKS: We're grateful for the Court's time.

THE COURT: Okay, all right. Okay, we're adjourned.

THE CLERK: All rise.

(Proceedings concluded at 2:57 p.m.)

CERTIFICATE

I, Chris Hwang, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ *Chris Hwang*
_____

Chris Hwang
Court Reporter

September 5, 2024
Date